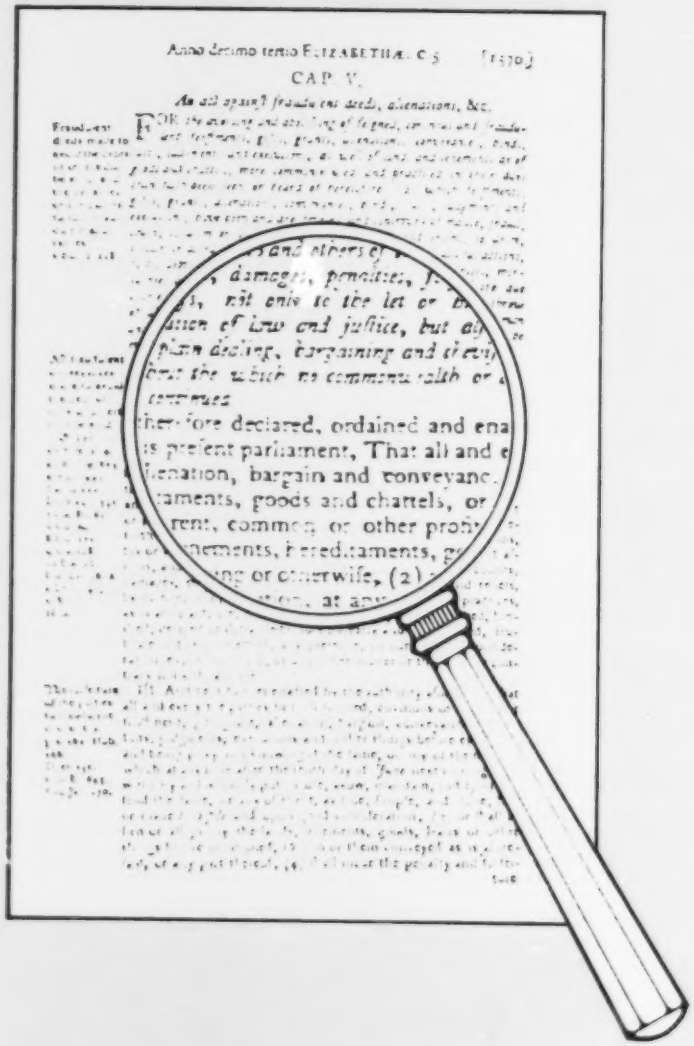
Law Reform Commission of Saskatchewan

Proposals for a Guardianship Act, Part I: Personal Guardianship

Report to the Attorney General

Saskatchewan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PROPOSALS FOR A GUARDIANSHIP ACT

PART I: PERSONAL GUARDIANSHIP

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Attorney General

January, 1983

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Prof. DOUGLAS A. SCHMEISER, Q.C., B.A., LL.B., LL.M, S.J.D., Chairman

Miss MARJORIE A. GERWING, Q.C., B.A., LL.B.

Mr. GORDON J. KUSKI, LL.B.

Mr. Kenneth P. R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B. is the Legal Research Officer. The secretaries are Mrs. Sandra L. Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act.

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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Saskatchewan

Law Reform
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To The Honourable J. Gary Lane, Q.C.
Attorney General for Saskatchewan

Dear Mr. Attorney General:

As part of its medical-legal project, the Commission has examined the law relating to personal guardianship, and in January, 1981 released "Tentative Proposals for a Guardianship Act, Part I: Personal Guardianship."

The present law which is set out in *The Mentally Disordered Persons Act* is archaic and inadequate. The Commission has attempted therefore to provide an accessible, understandable and efficient legal framework for the appointment of personal guardians for those who lack capacity to take care of themselves. The supervision and accountability of personal guardians being matters of the utmost importance, the establishment of an ombudsman-like official is proposed, such official to monitor and supervise, subject to ultimate court authority, personal guardians in the exercise of their authority.

The Commission is much obliged to officials in the Departments of Health and Social Services who commented on the Tentative Proposals. The Commission is also indebted to the Saskatchewan Association for the Mentally Retarded which sponsored a number of public meetings throughout the province where the Tentative Proposals were presented and discussed. The proposed legislation in this, the Commission's Final Report, incorporates many of the suggestions received by the Commission.

Pursuant to section 9 of *The Law Reform Commission Act*, the Commission now submits this report and recommends enactment of *The Personal Guardianship Act*.

Respectfully submitted this 12th day of January, A.D. 1983.

D. A. Schmeiser

Douglas A. Schmeiser, Q.C., Chairman

Marjorie A. Gerwing, Q.C., Commissioner

Gordon J. Kuski, Commissioner

PROPOSALS FOR A GUARDIANSHIP ACT:

PART I: PERSONAL GUARDIANSHIP

I. INTRODUCTION

This report deals with the selection, appointment and authority of personal guardians for persons who are unable to take care of themselves. For the parents of a mentally retarded child, what happens to that child after their deaths is an agonizing concern. The trend toward deinstitutionalization of mentally disordered persons, many of whom can re-enter the community with supervision and guidance, should be complemented by modern, practical guardianship legislation. Provision of guardianship assistance to elderly persons who have become incapacitated may become of significant importance in the future if the projected population growth of Saskatchewan citizens aged 65 and over proves accurate.

Some of the difficult questions surrounding guardianship for adults recently received national attention when Justin Clark, a 20-year-old cerebral palsy victim contested with his parents in an Ontario courtroom his ability to make decisions for himself. The Commission's recommendations would not make those questions easier to resolve, but modernized guardianship legislation would provide a better framework for grappling with the issues, ensuring that the right questions are asked and that the court hears the relevant evidence.

The need for guardianship legislation has been widely recognized. Both the National Institute on Mental Retardation [1] and international groups [2] have proposed and discussed guardianship legislation. In this province, the Saskatchewan Association for the Mentally Retarded has advocated adoption of such legislation. In Alberta, *The Dependent Adults Act* [3] was adopted in 1976, following consideration of the concept in a government study paper.

II. THE PRESENT LAW IN SASKATCHEWAN

Early law identified "idiots" and "lunatics" as being subject to the custodial authority of the Crown but only where there was property to manage. Blackstone identified the guardianship of idiots and lunatics as one branch of the "King's ordinary revenue".[4]

With its roots in the King's revenue, the jurisdiction matured into a supervisory one exercised by the courts as a "parental and protective jurisdiction for the benefit of the lunatic".[5]

Saskatchewan enacted its first "lunacy" legislation in 1919.[6] This *Act* was modelled on the English *Lunacy Act* [7] of 1890 which amended and consolidated provisions of earlier lunacy Acts. Except that "lunatics" are now referred to as "mentally disordered persons", *The Mentally Disordered Persons Act* [8] has remained virtually unchanged.

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1. *See* Paul McLaughlin, *Guardianship of the Person*, National Institute on Mental Retardation, 1979.
2. *See* "Symposium on Guardianship of the Mentally Retarded: Conclusions", International League of Societies for the Mentally Handicapped, Brussels, 1969.
3. *See* S.A. 1976, c. 63.
4. Blackstone, *Commentaries on the Laws of England*, (10th ed.), 1787, Vol. I, at 303.
5. Theobald, *The Law Relating to Lunacy*, 1924, at 4.
6. *The Lunacy Act, 1919*, S.S. 1918-19, c. 58.
7. 53 & 54 Vict., c. 5
8. R.S.S. 1978, c. M-14

The *Act* provides that:

> The court may . . . make orders for committing the custody of mentally disordered persons and the management of their estates, and every such order shall take effect as to the custody of the person immediately, and as to the custody of the estate upon the completion of the committee's security.[9]

The *Act* is property orientated. Court records do not disclose any orders having been made only for custody of the person and very few orders which provide for management of the estates of mentally disordered persons include a provision for custody of such persons. No guidance is provided to the court for determining when appointment of a guardian of the person would be appropriate, nor does the *Act* indicate the scope of the personal guardian's authority, or provide any guidance for the exercise of that authority. Clearly, existing Saskatchewan law is inadequate.

III. PURPOSES OF GUARDIANSHIP UNDER THE PROPOSED ACT

Guardianship legislation can only be justified to the extent that it furthers the goal of providing quality care and protection for the rights of persons unable to care for themselves. But it is important to recognize what guardianship legislation is not. It is not a substitute for effective social programs to provide services and financial assistance to persons who cannot care for themselves. Rather, it provides a legal status in cases in which formal recognition of the relationship of guardian and ward is required to ensure that adequate care and protection are provided. A mentally incapacitated person living at home with his parents or relatives will usually not require a guardian. Similarly, it will not be necessary to appoint a guardian in all cases in which an incapacitated person is living in a group home or other institution. In most cases, care will be provided by persons exercising *de facto* authority over the potential ward.

Guardianship becomes necessary only where there is a need to clearly establish legal authority and responsibility, or to interfere with *de facto* authority which has been exercised in an unacceptable manner. It is not possible to set out in an exhaustive manner the cases in which apppointment of a guardian would be appropriate. In fact, it can be expected that once guardianship legislation is adopted, experience will indicate those situations in which appointment of a guardian is appropriate. However, it may be useful to set out some examples of situations in which appointment of a guardian probably would be indicated:

(1) The parents of mentally retarded adults are usually concerned about the care and supervision their retarded children will receive after their own deaths. In some cases, it is posssible to reach an informal understanding with the retarded child's siblings, or other concerned relative. There is, however, at present no mechanism for the parents to ensure that some person will have legal authority to take responsibility for the care and supervision of a retarded adult child after the parents' deaths. In the Commission's opinion, it would be entirely appropriate for a parent to make a testamentary appointment of a guardian.

(2) Unless appointed as guardian, a parent has no legal authority to control the behaviour of his adult retarded child. Similarly, unless a potential ward has been committed to an institution under *The Mental Health Act*, the persons in charge of a group home or other institution have no legal authority over their charges. *De facto* authority may not be satisfactory where it is necessary to impose restrictions on a *de facto* ward against his

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[9] Ibid., s.3.

will. For example, a mentally retarded person living at home or in a group home may require discipline, or may resist changes in his associations and lifestyle which are nevertheless in his interest. Appointment of a guardian would be appropriate in such cases.

(3) If the care and supervision provided by the person who has *de facto* responsibility for an incapacitated person are not adequate, it may be necessary to intervene. In some cases, inadequate care may amount to an offence under the *Criminal Code*.[10] However, intervention would be justified even in cases in which it would not be appropriate to lay a criminal charge, and in any event, a criminal prosecution would not provide substitute care and supervision for the incapacitated person. Guardianship legislation would provide a mechanism for substituting a new guardian in such cases.

(4) Some mentally retarded persons, or outpatients suffering from mental disorder, may be capable of living on their own with some degree of supervision . Appointment of a guardian would provide a means of providing that supervision. The guardian would be able to intervene to provide direction to the ward in necessary cases.

(5) In many cases, institutional staff make decisions on behalf of their charges on a daily basis.[11] Although appointment of a guardian would not always be necessary in such cases, there are situations in which establishment of formal authority would be desirable. For example, if the ward requires continuing health care, appointment of a guardian to provide consent to the health care may be desirable.

Subsection (1) of section 3 of the proposed Act permits the court to appoint a guardian in circumstances where the proposed ward

> lacks sufficient capacity to understand the nature and appreciate the consequences of decisions in respect to matters relating to his or her personal care and welfare, and who is in need of care or supervision.

The jurisdiction of the court under that proposal is broad enough to permit appointment of a guardian in any appropriate case. The Commission does not believe that the jurisdiction can be further limited without creating the risk that appointment of a guardian would not be possible in some appropriate cases. However, if appointments were made in all cases within that jurisdiction, many guardians would be unnecessarily appointed. The Alberta *Dependent Adults Act* has been criticized for just that reason.[12] To avoid that result, the proposals, rather than limiting the court's jurisdiction, attempt to guide the exercise of that jurisdiction by discouraging appointment of guardians in cases in which there is no practical or legal need to establish a formal guardian-ward relationship. Subsection (3) of section 3 provides that:

> Nothing in this Act shall require the court to appoint a personal guardian for a person where such an appointment is not necessary to ensure adequate care and supervision of the proposed ward, or for any legal purpose.

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10. Section 197 of the *Criminal Code* provides that "(1) everyone is under a legal duty (c) to provide necessaries of life to a person under his charge if that person (i) is unable by reason of detention, age, illness, insanity or other cause to withdraw himself from that charge, and (ii) is unable to provide himself with necessaries of life".

11. Under section 25 of *The Mental Health Act*, persons involuntarily committed to an institution may be given medical treatment without consent on the authority of the medical officer in charge. Voluntary patients, however, are normally required to consent.

12. Paul McLaughlin, *Guardianship of the Person, supra*, suggests that under the Alberta legislation "hundreds, if not thousands" of guardianship applications might be made, placing unmanageable strain on social service and volunteer organizations. This prediction has been born out to some extent.

In addition, the Commission believes that appointment of guardians to consent to medical care can be avoided in many cases. At present, section 90 of *The Public Health Act* permits required health care to be given to a person who is incapable of consenting upon the consent of his nearest relative, or where such consent cannot be obtained, upon the authority of two medical practitioners. That provision can be used to provide health care to potential wards. However, the procedure is cumbersome, especially for institutionalized patients, and is essentially confined to emergency situations. For that reason, the Commission proposes an alternative method of authorizing health care for persons for whom guardians might be appointed. Section 22 of the proposed Act would permit the attending physician to provide health care to such persons upon the consent of a parent, guardian or person in charge of an institution with responsibility for the incapacitated person.

IV. SCOPE OF AUTHORITY OF GUARDIANS UNDER THE PROPOSED ACT

It is clear that just as the question when appointing a guardian of property is the capacity of the person to look after his or her business affairs, so the question when appointing a personal guardian is the capacity to take care of oneself. The issue is self-reliance: to the extent that persons are capable of taking care of themselves, they must be accorded that opportunity; to the extent that they are reliant on others for decisions respecting their self-care, they must have the opportunity to have a personal guardian appointed to make those decisions.

It is not the quality of one's personal care decisions that need interest us, but rather the capacity of the person to make those decisions. Interference in a person's life simply because an unreasonable decision has been made is unacceptable. It is only for those persons who are unable, that is, who lack the capacity, to make their personal care decisions that the courts should appoint a personal guardian. Eccentricity is not a reason which in itself dictates such a course of action; nor is bad judgment. Nevertheless, there is a standard of personal care below which society will intervene in the best interests and for the protection of persons falling below that standard. This intervention must be tempered with the recognition that capacity is a relative concept. Thus, implicit in modern notions of personal guardianship is the idea that orders appointing personal guardians should be "tailor-made" to the needs and capabilities of those persons who are capable of making some, but not all, of their personal care decisions.

One of the purposes of a "tailor-made" personal guardianship order is to protect the protected from being over-protected. "Protective over-kill" is a major concern of those who recommend greater use of personal guardianship as a "protective service". By its very nature, personal guardianship not only imposes the obligation of protection on the guardian, but also provides the opportunity for exploitation. The exercise of personal guardianship in a paternalistic manner, out of the best of motives, may, in the end result, not be an exercise in the best interests of the ward.

Much will depend on the person who is appointed personal guardian. No person should be appointed unless the court is satisfied that the proposed guardian appears to be suitable and is likely to provide the protection which the ward requires. As well, the courts should consider the wishes of the person for whom a personal guardian is sought to the extent that the court considers appropriate, having regard to that person's capacity.

While the Commission considers it highly desirable that the role of guardian be undertaken by private citizens, nevertheless there will be instances where there is no one willing or capable of acting as personal guardian for a particular individual. Recent legislation in Alberta has attempted to resolve that problem by establishing the office of the Public Guardian. The Public Guardian has jurisdiction to be appointed personal guardian where no one else is willing, able or suitable to be appointed. As well, the Public Guardian is personal guardian of any person whose guardian has died, where no on else is willing to act.

Under the Alberta scheme, the Public Guardian assumes a dual role of guardian and "ombudsman". The Commission would prefer to see those roles separated. Therefore, it is recommended that the Minister of Social Services be appointed personal guardian where a person is in need of a personal guardian and there is no one suitable or willing to be appointed as such. The "ombudsman" role should be filled by an independent officer of the Legislature whom we refer to as the "Official Representative". This arrangement will meet the argument that a supplier of social services should not be appointed personal guardian, with the inevitable conflict of interest which may arise. The Department will also be responsible under the *Act* for investigating whether an individual is in need of a guardian.

V. THE OFFICIAL REPRESENTATIVE

The Alberta *Dependent Adults Act* recognized the need for appointment of an independent official to protect the interests of wards by creation of the office of the Public Guardian. Such an official is needed because wards and prospective wards cannot usually speak for themselves. The Commission recommends appointment of an official representative to fill that role, though unlike his Alberta counterpart, he would not act as a guardian in any case. The Official Representative will be responsible for protecting the interests of proposed wards and wards in guardianship proceedings, investigating complaints against guardians, and providing assistance to guardians. Some of the situations in which the Official Representative might take action under the proposed legislation include:

1. Where an application is made for an order appointing a personal guardian,
   (a) if the Official Representative is of the opinion that the person in respect of whom the application is made is not in need of a personal guardian, then the Official Representative will oppose the application;
   (b) if the Official Representative is of the opinion that the person proposed as personal guardian is not suitable, again the proper course will be to oppose the application;
   (c) if the applicant is seeking greater personal guardianship authority than the Official Representative considers necessary, such opinion will be brought to the court's attention.

2. Once an order appointing a personal guardian is made, if the Official Representative is of the opinion that the order is not being carried out in accordance with its terms and the terms of the Act, an application for review of the order will be made.

3. Where the Official Representative finds that a person is in need of a personal guardian and there is no one willing to assume that role, the proper course will be to launch an application to have the Minister named as personal guardian. The monitoring role of the Official Representative will be no different in the case where the Minister is appointed personal guardian than it will be in the case of a private individual appointed as such.

VI. THE PROPOSED ACT

An Act respecting Guardians for Persons who lack Capacity to take care of Themselves.

Short Title

1. This Act may be cited as *The Personal Guardianship Act.*

Definitions

2. (a) "applicant" means a person who brings an application under this Act;

(b) "court" means the Court of Queen's Bench;

(c) "department" means the Department of Social Services;

(d) "minister" means the Minister of Social Services;

(e) "official representative" means the person appointed as such pursuant to section 17 of this Act;

(f) "person" includes the official representative, the minister, or any other social welfare agency;

(g) "personal guardian" means the person named as such in an order of the court or a person who is constituted such by operation of this Act;

(h) "proposed ward" means the person in respect of whom an application for the appointment of a personal guardian is made under this Act;

(i) "ward" means a person in respect of whom an order appointing a personal guardian has been made.

Jurisdiction

3. (1) The court may, on the application of a person having, in the opinion of the court, a sufficient interest, make an order appointing a personal guardian for a person who lacks sufficient capacity to understand the nature and appreciate the consequences of decisions in respect of matters relating to his or her personal care and welfare and who is in need of care or supervision.

(2) Where an application is made under this section the court shall inquire into

(a) the extent to which the proposed ward is in need of a personal guardian and for that purpose shall consider the physical, psychological, emotional, social, medical, residential, vocational, economic and other needs of the proposed ward; and

(b) the wishes of the proposed ward to the extent that the court considers appropriate having regard to the capacity of the proposed ward.

(3) Nothing in this Act shall require the court to appoint a personal guardian for a person when such an appointment is not necessary to ensure adequate care and supervision of the proposed ward, or for any legal purpose.

Court may order a report

4. (1) The court may appoint a person to make an investigation and to prepare a report on any or all of the matters referred to in section 3(2).

(2) The person so appointed shall prepare and file a report with the court and the report shall be available to all parties to the proceedings.

(3) (a) The report shall be admissible without proof of the qualifications of the person preparing the report; and

(b) the person who prepares the report shall be available for cross-examination on the motion of any party to the proceedings.

Procedure

5. (1) On any application pursuant to this Act, the applicant shall serve a copy of the application on

(a) the proposed ward or ward;

(b) the nearest relative of the proposed ward or ward;

(c) the proposed personal guardian or personal guardian if he or she is neither the applicant nor the the nearest relative who is served pursuant to clause (b);

(d) if the proposed ward or ward is a resident of a facility, the person in charge of the facility;

(e) the official representative if he or she is not the applicant;

(f) any trustee of the property of the proposed ward or ward; and

(g) such other person having an interest in the custody and care of the proposed ward or ward as the court may consider appropriate under the circumstances.

(2) The court may

(a) dispense with service on all or any of the persons referred to in subsection (1), except the official representative, and subject to clause (b), the proposed ward or ward; or

(b) dispense with service on the proposed ward or ward if

(i) the official representative consents; and

(ii) the court is satisfied that to do so would be in the best interests of the proposed ward or ward.

(3) The official representative shall have a right to intervene and make representations in any application or other proceeding under this Act.

Persons eligible to act as personal guardians

6. (1) The court may appoint as a personal guardian any person eighteen years of age or older.

(2) No person shall be appointed personal guardian unless the court is satisfied that the proposed guardian is capable of carrying out the duties of a personal guardian in a satisfactory manner, having regard to the needs of the proposed ward and the relationship between the proposed personal guardian and the proposed ward.

Authority of a personal guardian

7. (1) Subject to subsection (3), where the court makes an order appointing a personal guardian, the court shall specify whether all or any one or more of the following matters relating to the ward's personal care and welfare are to be subject to the authority of the personal guardian:

(a) where and with whom the ward is to live;

(b) whether the ward should work, and if so, the nature or type of work, for whom the ward is to work, and other related matters;

(c) whether the ward should take or participate in any educational, vocational, or other training, and if so, the nature and extent of that training and matters relating to that training;

(d) whether the ward should apply for any licence, permit, approval or other consent or authorization required by law;

(e) the right to sue or defend any legal action on behalf of the ward and to settle any legal action on behalf of the ward with the approval of the Court;

(f) the consent to any necessary health care that is in the ward's best interests; and

(g) such normal day-to-day decisions on behalf of the ward, including diet and dress, as a guardian would reasonably be expected to make in the best interests of the ward and that are not specified or referred to in this subsection.

(2) In making an order appointing a personal guardian, the court may

(a) make its order subject to such conditions and restrictions as it considers necessary; and

(b) restrict, modify, change or add to any of the matters specified or referred to in subsection (1).

(3) Notwithstanding anything in subsection (1), the personal guardian shall not have the authority, except with a specific order of the court,

(a) to consent to voluntary committal or hospitalization of a ward in a facility within the meaning of *The Mental Health Act*;

(b) to consent on behalf of the ward to an *inter vivos* transplant under *The Human Tissue Gift Act*;

(c) to consent on behalf of the ward to a sterilization except where it is the treatment for some present or inevitable disease;

(d) to consent on behalf of the ward to a therapeutic abortion except where the continuation of the pregnancy of the ward would or would be likely to endanger her life or health;

(e) to consent on behalf of the ward to the termination of the ward's parental rights; or

(f) to interfere with the ward's exercise of religious practices except to the extent that those practices threaten the ward's health or estate.

Civil liability

(4) No action or other proceeding for damages lies against any person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by this Act.

Incidental authority

(5) A guardian may do whatever is necessarily incidental in the exercise of any authority conferred by the Court pursuant to this section.

Exercise of the personal guardian's authority

8. A personal guardian shall exercise the specific duties and powers assigned by the court diligently, in good faith, and in a manner so as to

(a) ensure that the ward's civil and human rights are protected; and

(b) encourage the ward to

(i) participate to the maximum extent in all decisions affecting him or her; and

(ii) act for himself or herself in all matters in which he or she is able to do so.

Maintenance

9. The court may make an order

(a) for the expense of sheltering, supporting, and caring for the ward; and

(b) setting a fee for services rendered by the personal guardian;

by payment from time to time out of the estate and property of the ward.

Access

10. In making an order appointing a personal guardian, the court may provide for access to the ward by someone other than the person appointed personal guardian, having regard to the best interests of the ward.

Mandatory Review

11. (1) Upon making an order appointing a personal guardian, the court shall specify

(a) the time within which the order must be reviewed by the court which shall not be later than five years after the date of the order;

(b) the person required to apply to the court for the review; and

(c) any requirement to be complied with by the personal guardian or any other person with respect to a review of the circumstances of the ward.

(2) Where the person required to apply to the court for the review pursuant to subsection (1)(b) fails to do so, the official representative shall make the application for review.

Application for review

12. (1) The court may, at any time, on the application of the ward or a person having a sufficient interest, review the appointment or testamentary nomination of a personal guardian under this Act and where there has been a material change of circumstances, may alter or vary the authority of the personal guardian or discharge the personal guardian.

(2) Before making an order discharging a personal guardian under subsection (1) the court shall be satisfied that, where necessary,

(a) suitable arrangements have been or will be made for the ward; or

(b) an application for another personal guardianship order will be made.

Costs

13. The court may order that the costs of any application or report made to it pursuant to this Act be paid

(a) by the applicant; or

(b) by the Crown; or

(c) out of the ward's estate and property;

or by any two or more of them.

Duty to report

14. (1) Everyone who has information that a person may be a person in respect of whom an order should be made under section 3(1) shall report that information to the department or to a peace officer or to the official representative.

(2) A person who makes a report pursuant to subsection (1) is not liable in any action for making the report unless the report is false and is made maliciously or recklessly.

(3) A peace officer or the official representative when in receipt of information under subsection (1) shall forthwith report the information to the department.

(4) Any information received by the department under subsection (1) shall be reported forthwith to the official representative.

(5) The department shall investigate reports pursuant to subsection (1) and shall file a copy of its report with the official representative.

Entry to investigate

15. (1) Where the department has been requested to investigate a complaint pursuant to section 14(5) and is refused access to the person who is the subject of the complaint, an application may be made to a justice of the peace or to a provincial court judge for a warrant authorizing the applicant to enter and search, by force if necessary, any premises or other place specified in the warrant in order to conduct an investigation.

(2) The department, a peace officer, or the official representative, having reasonable and probable grounds to believe that a person may be a person in respect of whom an order should be made under section 3(1) and that person's health or welfare is in immediate jeopardy, may enter without warrant into any premises for the purpose of taking custody of that person and removing him or her to a place of safety and may without warrant take custody of that person and, where considered necessary, remove him or her to a place of safety.

(3) The department, a peace officer, or the official representative, having reasonable and probable grounds to believe that a personal guardian has died or ceased to act and that the ward's health or welfare is in immediate jeopardy, may enter without warrant into any premises for the purpose of taking custody of the ward and removing him or her to a place of safety and may without warrant take custody of the ward and, where considered necessary, remove him or her to a place of safety.

(4) A peace officer or the official representative after taking custody of a person under subsection (2) or subsection (3) shall forthwith report the matter to the department which shall, whenever practicable, assume custody of the person and thereafter be responsible for that person's care and supervision.

(5) Where the department assumes custody of the person under this section, such custody shall not extend beyond five days unless an application is made under section 3(1).

(6) Where the department assumes custody of the person under this section, it shall report that information to the official representative forthwith.

Duties of the Minister

16. (1) Where it appears to the court that

(a) a person is a person in respect of whom an order should be made under section 3(1); and

(b) there is no one suitable and willing to be appointed that person's personal guardian;

the court shall appoint the minister as the person's personal guardian.

(2) Where the minister has been appointed the personal guardian, the minister shall be responsible, subject to section 9, for the expense of sheltering, supporting, and caring for the ward.

(3) The minister may make such payments as is considered necessary to or for the benefit of a personal guardian, ward, or other person, where special services or moneys are considered by the minister essential to enable the personal guardian to care for the ward.

The official representative

17. (1) There shall be appointed as an officer of the Legislature an official representative of persons for whom a personal guardian has been appointed or constituted under this Act.

(2) The official representative shall keep under review all applications and orders made under this Act in order to further the best interests of proposed wards and wards.

(3) The official representative may

(a) provide consultative services to assist in the co-ordination of existing community and other services and in the development of new services; and

(b) conduct research with a view to ascertaining more effective methods of providing community and other services aimed at promoting and carrying out the purposes of this Act.

(4) The official representative shall make and submit to the Speaker of the Assembly an annual report, which shall be laid before the Assembly within fifteen days from the commencement of the session next following the end of the year for which the report is made, respecting the exercise of his or her powers and the performance of his or her duties and functions under this Act, including, without limiting the generality of the foregoing,

(a) the number of orders made under section 3(1); and

(b) the number of apprehensions made under section 15(2) and section 15(3).

Application to court for directions

18. Any personal guardian may apply to the court for advice or direction.

Testamentary personal guardians

19. (1) Upon the death of a personal guardian, who has made a testamentary nomination of a person to act as personal guardian, the testamentary nominee, upon notifying the official representative that he or she consents to act as personal guardian, shall, subject to subsection (2), become the personal guardian as though the nominee had been named as personal guardian in the order constituting the deceased as personal guardian.

(2) Upon the receipt of the notification referred to in subsection (1), the official representative shall investigate the qualifications of the testamentary guardian, and if the testamentary guardian does not appear to be an appropriate person to act as guardian, the personal representative shall apply to the court for removal of the testamentary guardian.

Appeal

20. An appeal lies from any order of the court to the Court of Appeal within the time and in accordance with the practices and procedures established in the rules of the Court of Appeal.

Authority preserved

21. Nothing in this Act shall be construed as derogating from any authority which might have been exercised by a parent, physician, the Minister or any other person who has taken responsibility for a person for whom a guardian might be appointed under this Act, if this Act had not been adopted.

Authority of physician

22. (1) Notwithstanding this Act or any other law, if no personal guardian has been appointed or the personal guardian has no authority under clause (f) of subsection (1) of section 7, health care other than the health care described in subsection (3) of section 7, may be provided to a person who, in the opinion of the attending physician:

(a) is incapable of consenting to the proposed health care; and

(b) is a person for whom a guardian could be appointed under this Act;

upon the consent of

(i) a parent of the person; or

(ii) a person, including the Minister or the official in charge of a residential school or other institution, who has taken responsibility for the care and supervision of the person for whom the health care is proposed.

(2) If an application has been made for appointment of a guardian, the court may order that no health care may be provided under this section or without the consent of the patient under any other law, except in an emergency, without the approval of the court pending final disposition of the application.

VII. CONSEQUENTIAL AMENDMENT OF *THE MENTALLY DISORDERED PERSONS ACT*

In view of our proposals for a Personal Guardianship Act, we recommend that the power of the court to appoint a personal guardian under the provisions of *The Mentally Disordered Persons Act* be removed and consequently, the words "the custody of mentally disordered persons", where they appear in section 3 of the said *Act*, should be deleted.

VIII. CONSEQUENTIAL AMENDMENT OF *THE MARRIAGE ACT*

If the proposed Personal Guardianship Act is enacted, an amendment to *The Marriage Act*[13] will be required. The present *Marriage Act* provides that:

> No person who:
>
> (a) is a mentally retarded person as defined in the regulations;
>
> (b) is a mentally ill person as defined in the regulations; or
>
> (c) has, in a communciable state, one of the communicable diseases specified in the regulations;
>
> shall marry within the province.[14]

Further, the *Act* provides that:

> No clergyman or marriage commissioner shall perform a marriage ceremony where he knows or has reason to believe that one of the parties to the marriage:
>
> (a) is a mentally retarded person as defined in the regulations;
>
> (b) is a mentally ill person as defined in the regulations; or
>
> (c) has, in a communicable state, one of the communicable diseases specified in the regulations.[15]

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13. R.S.S. 1978, c. M-4.
14. *Ibid.*, s.53.
15. *Ibid.*, s.54(1).

Before performing a marriage ceremony, the clergyman or marriage commissioner must have received a health certificate from a qualified medical practitioner stating that the person examined

> is not a mentally retarded person or is not a mentally ill person, as defined in the regulations under The Marriage Act . . . .[16]

This medical examination must have taken place within the 30 days immediately preceding the date of the solemnization of the marriage.[17]

Pursuant to the regulations, a mentally retarded person is defined as:

> one who is incapable of functioning in a marriage relationship due to significantly subaverage intellectual development with deficits in adaptive behaviour[18].

and a mentally ill person is defined as:

> one who is incapable of functioning in a marriage relationship due to severe disorder of thought, emotion or behaviour[19]

In view of our proposals for a Personal Guardianship Act, we recommend that sections 53 and 54, at least insofar as they refer to mentally retarded and mentally ill persons, be redrafted in order to parallel the language of the draft Act:

> 53. No person who:
>
> (a) lacks sufficient capacity to understand the nature of and appreciate the consequences of marriage; or
>
> (b) has, in a communicable state, one of the communicable diseases specified in the regulations;
>
> shall marry within the province.
>
> 54. —(1)No clergyman or marriage commissioner shall perform a marriage ceremony where he knows or has reason to believe that one of the parties to the marriage:
>
> (a) lacks sufficient capacity to understand the nature of and appreciate the consequences of marriage; or
>
> (b) has, in a communicable state, one of the communicable diseases specified in the regulations.

In addition, the regulations defining a "mentally retarded person" and a "mentally ill person" should be repealed and the language of the health certificate should be redrafted to reflect the language of the redrafted section 54(1)(a) of *The Marriage Act*.

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16. *Ibid*., s.54(2); Saskatchewan Regulations 219/78, published in *The Saskatchewan Gazette*, July 14, 1978.
17. *The Marriage Act, Ibid*., s.54(3).
18. *Ibid*., s.58.
19. Saskatchewan Regulations 219/78 supra, note 16.